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No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

UNITED FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

This case concerns the constitutionality of the assessments imposed on members of the mushroom industry, pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990 (Mushroom Act), 7 U.S.C. 6101 *et seq.*, to fund a generic advertising program designed to support that industry. The Sixth Circuit, distinguishing *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457 (1997), held that the Mushroom Act and the Secretary of Agriculture's implementing regulations violate the First Amendment to the extent they require the payment of such assessments. The Tenth Circuit, in contrast, has upheld under *Wileman* the assessments imposed under the virtually identical advertising program authorized by the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*

1. Respondent identifies no case in which this Court has denied the government's request to review a decision of a federal court of appeals invalidating all, or any significant part, of an Act of Congress.[1] That is precisely what the court of appeals did here, contrary to respondent's claim (at 23) that "*no* Act of Congress was invalidated below—only an administrative order." The court of appeals could not have been clearer that it was invalidating the Mushroom Act to the extent that it provides for mandatory payments by members of the industry:

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[1] We are aware of only one such case, *FCC* v. *Action for Children's Television (ACT)*, 503 U.S. 914 (1992) (No. 91-952), which concerned the regulation of "indecent" broadcasting. Because the court of appeals remanded that case to the FCC for further proceedings, the case was in an interlocutory posture, and the respondents argued, *inter alia*, that the caes was not ripe for review. Br. of Respondents ACT *et al.* at 18-19. In addition, the respondents argued that, because the court of appeals panel included then-Judge Thomas, who had since been appointed to this Court, the case could produce an equally divided Court. *Id.* at 19 n.39. This case presents neither of those circumstances.

> [T]he effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. *The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.* (Pet. App. 8a (emphasis added)).

Nor is the Mushroom Act merely agnostic, as respondent suggests (at 21-23), as to whether payments to fund the advertising program are to be mandatory or voluntary. Several provisions of the Act make clear that such payments are to be mandatory.

First, the Mushroom Act states that any order establishing an advertising program "*shall* provide that *each* first handler of mushrooms for the domestic fresh market produced in the United States *shall* collect * * * assessments from producers." 7 U.S.C. 6104(g)(1)(A); see 7 U.S.C. 6104(g)(1)(B) and (C) (similar provisions applicable to "each importer of mushrooms for the domestic fresh market" and "[a]ny person marketing mushrooms of that person's own production directly to consumers"). In using the term "assessments" and the mandatory word "shall"—and by specifying that the assessments are to be remitted by "each" handler, "each" importer, and "any" direct marketer—Congress made it clear that payment was not a voluntary matter.

Second, the Mushroom Act provides that any order establishing an advertising program is to take effect only if approved in a referendum of producers and importers. 7 U.S.C. 6105(a); see also 7 U.S.C. 6105(b)(1)(A) and (B) (providing for a second referendum after five years and additional referenda if requested by producers and importers). If participation in the advertising program were voluntary, there would be little need for such referenda; those producers and importers who supported the program would participate, and those who opposed the program would not.

Third, the Mushroom Act provides that any order establishing an advertising program "shall contain * * * provisions for the assessment of a penalty for each late payment of assessments." 7 U.S.C. 6104(j). In addition, the Act provides for enforcement of the order in district court, including the imposition of a monetary penalty against anyone "who fails or refuses to pay, collect, or remit any assessment or fee duly required of the person under such order." 7 U.S.C. 6107(c)(1). Such provisions would serve no purpose if payment of assessments were purely voluntary.

Thus, in holding that "[t]he portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are * * * unconstitutional" (Pet. App. 8a), the court of appeals was invalidating the mechanism that Congress itself chose to assure adequate funding of the advertising program. The court was not, as respondent claims (at 23), merely invaliding "an administrative order."

2. As we explain in the certiorari petition (at 8-11), the court of appeals' decision in this case is inconsistent with *Wileman*, which rejected a First Amendment challenge to generic advertising programs for California fruits that were financed by assessments on producers. The Court identified three characteristics that distinguish those programs—which *enhance* speech—from laws that have been held to "abridge" speech: they "impose no restraint on the freedom of any producer to communicate any message to any audience," they "do not compel any person to engage in any actual or symbolic speech," and they "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469-470. The advertising program for mushrooms is indistinguishable, in all three respects, from the advertising programs in *Wileman*.

Respondent nonetheless contends (at 8) that the Sixth Circuit's holding "is compelled by" this Court's decision in *Wileman*. Respondent bases that contention largely on the Court's preliminary description in *Wileman* of the "statutory

context" in which the case arose, which noted that the marketing orders at issue "displaced many aspects of independent business activity," such as by setting maturity and minimum size standards for the fruits. 521 U.S. at 463, 469. We explain in the petition (at 10-11) why we do not read the Court's First Amendment holding to rest on that discussion of the California fruit industry. That discussion does not appear in the section of the Court's opinion that addresses why the advertising programs are unlike laws that violate the First Amendment. See 521 U.S. at 469-474. It instead appears principally in the preceding section, which identifies what is, and is not, at issue in the case. See *id.* at 469.[2]

Nowhere in *Wileman* did the Court state that its holding was limited to advertising programs included in marketing orders that extensively regulate an agricultural commodity. To the contrary, the Court noted that it had granted certiorari in *Wileman* "to resolve the conflict" with *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which involved the advertising program authorized by the Beef Act and implemented by an order of the Secretary that does not otherwise regulate the beef industry. 521 U.S. at 467. The Court was made aware of the differences in regulatory scope between the orders in *Wileman* and *Frame*. See Oral Arg. Tr. at 26, *Wileman* (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124. Yet, the Court did not even suggest that the advertising programs in both cases were

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[2] It has been suggested that "the point" of the discussion of the regulatory context in *Wileman* was that "the advertising tool merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," and thus that "no greater weight should be given to the fact that the advertising tool involves an activity that, in other contexts, is 'commercial speech' protected by the First Amendment." *Gerawan Farming, Inc.* v. *Veneman*, 85 Cal. Rptr. 2d 598, 605 (Ct. App.), review granted, 983 P.2d 728 (Cal. 1999).

not equally constitutional. Thus, respondent's assertion (at 8) that *Wileman* somehow "compelled" the invalidation of the advertising program for mushrooms is baseless.

Respondent also contends (at 10) that a decision sustaining the mushroom advertising program would "go far beyond any of this Court's compelled speech precedents and permit the government to compel private parties to finance *any* commercial message of the government's choosing." In the first place, the Court has explained that advertising programs of the sort at issue here and in *Wileman* "do not compel any person to engage in any actual or symbolic speech," a "fact [that] distinguishes" such programs from the laws at issue in the Court's "compelled speech" precedents. 521 U.S. at 469 & n.13. Moreover, while noting that its precedents also recognize "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief,'" *id.* at 471, the Court explained that no such interest was implicated in *Wileman* because "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities," *id.* at 473. Those same characteristics are present here. The advertising program is "unquestionably germane" to the purposes of the Mushroom Act—which include "strengthen[ing] the mushroom industry's position in the marketplace" and "maintain[ing] and expand[ing] existing markets and uses for mushrooms," 7 U.S.C. 6101(b)(1) and (2)—and, "in any event," the assessments "are not used to fund ideological activities." 521 U.S. at 473. A decision upholding the mushroom program thus would not, as respondent asserts (at 10), give the government free rein to "compel private parties to finance *any* commercial message."

3. Respondent next asserts (at 13) that our contention that the decision below creates a conflict that merits the Court's resolution "is strained indeed, given that no other

federal or state court has *ever* even considered the constitutionality of [the mushroom] program." We note as a threshold matter that respondent's assertion is factually inaccurate. A federal district court in California (in an unpublished opinion appended to respondent's own brief in the court of appeals) upheld the assessments under the Mushroom Act against the same challenges raised here. See *Donald B. Mills, Inc.* v. *United States Dep't of Agriculture*, No. CV-F-97-5890 OWW SMS (E.D. Cal. Mar. 5, 1998), slip op. 8 (holding that "[n]othing in *Glickman* [v. *Wileman*] dictates that a contrary outcome is mandated for a 'stand-alone' advertising program" such as the program for mushrooms). More fundamentally, however, the conflict that (quite aside from the holding of an Act of Congress unconstitutional) warrants this Court's intervention is not with *Mills*, but with *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999). None of respondent's attempts to deny the existence of that conflict is meritorious.

First, respondent suggests (at 14) that no circuit conflict exists because *Goetz* involved the Beef Act while this case involves the Mushroom Act. As our petition explains (at 11), however, the two statutes are substantively identical; both are concerned almost exclusively with the establishment of programs to promote an agricultural commodity that are funded by assessments on producers or handlers. Compare 7 U.S.C. 2901 *et seq.* with 7 U.S.C. 6101 *et seq.* The Secretary's orders implementing those programs are also identical in all pertinent respects. Compare 7 C.F.R. Pt. 1260 (Beef Order) with 7 C.F.R. Pt. 1209 (Mushroom Order). Indeed, this Court recognized a circuit "conflict" in *Wileman*, 521 U.S. at 467, where the Ninth Circuit invalidated, but the Third Circuit upheld, advertising programs established under statutes and orders *less* similar than those here.

Second, respondent argues (at 14-15) that the First Amendment claim in *Goetz* "is distinguishable from and, indeed, is unrelated to" the First Amendment claim here.

Respondent is mistaken. The Tenth Circuit described the plaintiff's claim in *Goetz* as being that "the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption." 149 F.3d at 1138. Respondent's claim here is likewise that the assessment violates its First Amendment rights because it is compelled to support advertising that promotes mushrooms. C.A. App. 22 (Compl. ¶ 30). Moreover, as we note in the petition (at 11), the plaintiff in *Goetz* argued that his case was not controlled by *Wileman* because the Beef Act "is not an overall regulatory scheme like the [Agricultural Marketing Agreement Act]," under which the orders at issue in *Wileman* were issued; the plaintiff also argued that "[u]nlike the fact situations to which the *Wileman* decision has been restricted, the beef industry is * * * a highly competitive industry." Appellant's Supp. Br. at 6, *Goetz;* see also *id.* at 7 (contending that "limitations" in the *Wileman* opinion "restrict it from applying" to the Beef Act).[3] Thus, when the Tenth Circuit held that "under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless," 149 F.3d at 1139, that court was plainly rejecting his attempts to distinguish *Wileman* on the very grounds advanced by respondent here.

Third, respondent contends (at 15) that this case and *Goetz* are distinguishable on the ground that "the market for beef is less stable and (in part for that reason) more heavily regulated than the market for mushrooms," albeit under statutes other than the Beef Act. But the Tenth Circuit in *Goetz* did not even suggest, much less hold, that such considerations had any bearing on the constitutionality of the advertising program for beef.[4] Nor did the Sixth Circuit

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[3] In advance of the filing of the response to our certiorari petition in this case, we provided respondent's counsel with copies of our briefs and the appellant's supplemental (post-*Wileman*) brief in *Goetz*.

[4] In fact, the Livestock Mandatory Reporting Act of 1999, Pub. L. No. 106-78, 113 Stat. 1188 (to be codified at 7 U.S.C. 1635 *et seq.*), one of the

give any indication in this case that *any* "stand-alone" advertising program would withstand constitutional scrutiny.

In a footnote, respondent argues (at 21 n.5) that the government itself must perceive a distinction between the advertising programs for mushrooms and beef, because the Department of Agriculture is continuing to collect assessments under the beef program in the Sixth Circuit notwithstanding the decision below. Respondent's argument rests on the premise that the Department, in contrast, has ceased collecting assessments under the mushroom program in the Sixth Circuit. That is incorrect. As we informed respondent by letter dated October 13, 2000 (a copy of which we have lodged with the Clerk), USDA continues to collect assessments under *both* programs in the Sixth Circuit pending this Court's review because, in light of our pending certiorari petition, the decision below is not final binding precedent in that circuit.

4. Respondent concludes (at 23-25) with various other arguments as to why certiorari should not be granted. None of those arguments provides any persuasive reason to deny review, and thereby to allow the uncertainty created by the court of appeals' decision to fester.

First, respondent complains (at 23) that, since we have not identified any case currently challenging the constitutionality of federal generic advertising programs or any grower (other than respondent itself) currently withholding assessments under the mushroom program based on the Sixth Circuit's decision, we have "seriously overstate[d]" the significance of this case. As to the first point, while no cases presenting First Amendment challenges to federal advertising programs are pending, several such cases have been concluded in the past two years. All of those cases upheld

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statutes on which respondent relies (at 17-18) to distinguish the regulatory contexts applicable to beef and mushrooms, had not even been enacted when the Tenth Circuit decided *Goetz*.

those programs against First Amendment challenges.[5] It is not surprising that such cases tapered off after this Court's decision in *Wileman* and the subsequent unanimity of appellate decisions upholding advertising programs. The decision in this case, if allowed to stand, would destroy that unanimity, and thus invite a new round of litigation.

As to the second point, we have been informed by the Department of Agriculture (and informed counsel for respondent) that several mushroom producers (in addition to respondent) are in arrears in their assessments under the mushroom program. Until USDA commences formal collection proceedings against those producers (which cannot occur for several months), USDA has no mechanism for learning why they are withholding payments. Nor does the fact that relatively few producers have thus far withheld assessments detract from the significance of this case. Indeed, given that the government's decisions to seek rehearing and then certiorari in this case have been widely publicized among mushroom producers, even those who share respondent's views might prudently have chosen to continue paying assessments until this case is finally resolved.

Second, respondent asserts (at 24) that this case would be "an inappropriate vehicle" to decide the constitutionality of assessments under the Mushroom Act, because there is no extensive record "regarding the nature of the mushroom industry or the efficacy of the Mushroom Council's promotion program." But a central teaching of *Wileman* is that inquiries into the efficacy of generic advertising programs, like other economic regulations, are properly left to Congress, the Secretary, and the producers themselves by majority vote. See, *e.g.*, *Wileman*, 521 U.S. at 468, 476.

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[5] See *Cal-Almond Inc.* v. *United States Dep't of Agriculture*, 192 F.3d 1272 (9th Cir. 1999), cert. denied, 120 S. Ct. 2215 (2000); *Goetz*, 149 F.3d at 1138-1139; *Gallo Cattle Co.* v. *United States Dep't of Agriculture*, 189 F.3d 473 (9th Cir. 1999) (Table); *Nature's Dairy* v. *Glickman*, 173 F.3d 429 (6th Cir. 1999) (Table).

Accordingly, if the Court concludes, consistent with our position, that the advertising program in this case should be analyzed in the same manner as those in *Wileman*, the Court would have no need to consult the sort of record described by respondent. Alternatively, if the Court were to conclude that a different analysis should be applied, the Court could remand the case for the compilation of whatever record might be necessary. But the absence of a more extensive factual record is no reason to deny review, since the court of appeals has entered a judgment invalidating an Act of Congress. Unless reviewed by this Court, that judgment will become final and binding.

Finally, respondent asserts (at 24-25) that "[a] decision in this case is * * * unlikely to shed light on the constitutionality of many other programs involving products that are substantially regulated." In the first place, even if one were to accept respondent's assertion (at 24) that "the Mushroom Act presents the extreme example of a compelled promotion program," a decision upholding that program would almost certainly resolve the constitutionality of other programs that respondent would characterize as less "extreme." Moreover, as our petition explains (at 13-14 & n.7), the advertising program established under the Mushroom Act is virtually identical to programs established under a number of other statutes. Respondent, while asserting (at 25) that the advertising programs for beef and milk are distinguishable because those products are more "substantially regulated," does not even attempt to distinguish the programs that we identified for ten other agricultural products.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000